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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE THOMAS J. WHELAN)

(Honorable Leo S. Papas)

UNITED STATES OF AMERICA, Plaintiff, v. **MIGUEL ANGEL RUIZ MATA** Defendant.	Criminal No. **08 cr 2558-W** (LSP) **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR DEPOSITION AND RELEASE OF MATERIAL WITNESS**

STATEMENT OF FACTS AND CASE

On April 6, 2008 an indictment was filed against Miguel Angel Ruiz Mata, charging 3 counts of violations of Title 8, United States Code, section 1324.

Prior to the filing of the indictment, the prosecution had provided some incident reports of Mr. Ruiz Mata's arrest. There has been no "fast track" offer. The reports reflect the following.

Miguel Angel Ruiz Mata, a Mexican citizen, was driving a vehicle with five or six illegal immigrants in the vehicle (discovery unclear at this point at to number of individuals). Agents believed that the Honda Civic Mr. Ruiz Mata was driving was following another vehicle.

When stopped by law enforcement, three individuals were in the trunk, two were in the back seat, and *Material Witness, Jesus Guzman Gallardo was in the front seat of the car.*

Of the five illegal immigrants in the car (other than the defendant Ruiz Mata) , only three were questioned by agents. No information has been provided as to the whereabouts of two of the three who were questioned. It is presumed they have been removed. Although there are charges in the indictment relating to them, there is no information as to how to contact them and there is no indication the government has them available for trial. The third is Jesus Guzman Gallardo, the subject of this proposed deposition.

On August 14, 2008, material witness Jesus Guzman Gallardo filed a motion for a deposition so that he could be released and returned to his country of origin. The moving papers indicate that the witness has been in custody since July 21, 2008 and has been available for interview. In fact, despite several attempts by the defense investigator to arrange for an interview, arrangements have not been completed for an interview of the witness conducted by defense counsel or investigator. Thus far, the Government has only produced Mr. Guzman Gallardo's post-arrest interviews and arrest reports from this case. Some of the documents have redacted information about Mr. Guzman Gallardo.

II.

ARGUMENT

THE MOTION FOR A MATERIAL WITNESS DEPOSITION SHOULD BE DENIED BECAUSE THIS DEPOSITION WOULD VIOLATE MR. RUIZ MATA'S SIXTH AMENDMENT RIGHT TO CONFRONTATION, THE MOTION IS PREMATURE AND THERE HAS BEEN NO SHOWING OF WITNESS UNAVAILABILITY

Title 18, United States Code § 3144 governs the detention of individuals who may give testimony material to a criminal proceeding. This section provides that where the witness is not able to meet the conditions of the bond set by the court and is detained, the court may order the deposition of the witness where (1) deposition may secure the testimony of the witness and (2) further detention is not necessary to prevent a failure of justice. See 18 U.S.C. § 3144. In this case, the material witness has moved for a videotape deposition pursuant to 18 U.S.C. § 3144. Although a deposition might indeed secure his testimony, this Court should order his continued detention in order to protect the rights of Mr.Ruiz Mata or in the alternative, modify the conditions of release so that the material witness can remain in the United States until this case is resolved. The failure of this Court to so order would result in a failure of justice on several counts.

A. The deposition of material witnesses would violate the Confrontation Clause of the Sixth Amendment.

Depositions in criminal cases are generally disfavored for several reasons, including the threat they pose to the defendant's Sixth Amendment confrontation rights. United States v. Drougal, 1 F.3d 1546, 1551-52 (11th Cir. 1993). Criminal depositions are authorized only when doing so is "necessary to achieve justice and may be done consistent with the defendant's constitutional rights." Id. at 1551. See Fed. R. Crim. P. 15(a).

The Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004) reaffirmed the common law principle that testimonial statements may not be admitted against a defendant where the defendant has not had the opportunity to cross-examine the declarant. This is true even where the statements fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness." Id. at 1354. In Crawford, the Court noted that the Sixth Amendment was drafted in order to protect against the "civil-law mode of criminal procedure" and "its use of *ex parte* examinations as evidence against the accused." Id. at 1363. Such *ex parte* examinations implicate Sixth Amendment concerns because they are "testimonial" in nature. The "text of the Confrontation Clause reflects this focus" and applies to "witnesses against the accused - in other words, those who bear testimony." Id. at 1363 (internal quotations omitted). Although the Court declined to define "testimonial" evidence, they noted that an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. at 1364. The Confrontation Clause does not permit such testimonial statements to be admitted at trial against an accused without the "constitutionally prescribed method of determining reliability," *i.e.*, confrontation. Id. at 1365. In other words, "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability [of the declarant] and a prior opportunity for cross-examination." Id. at 1366.

Despite Crawford's broad prohibition of testimonial statements at trial where the defendant has no opportunity to confront the witness, there remain some situations in which depositions may be taken. In these situations, the burden is on the moving party to establish exceptional circumstances justifying the taking of depositions. Drougal,supra at 1552 (citing United States v. Fuentes-Galindo, 929 F.2d 1507, 1510 (10th Cir. 1991)). The trial court's discretion is generally guided by consideration of certain "critical factors," such as whether: (1) the witness is unavailable to testify at trial; (2) injustice will result because testimony material to the movant's case will be absent; and (3) countervailing factors render taking the deposition unjust to the nonmoving party. Id. at 1552. Here, because the material witness has not shown that any exceptional circumstances exist, the motion for videotape depositions should be denied.

When considering the issue, this Court must balance the interests of the Government and the accused, as well as the interests of the material witness. Although the material witnesses may have a liberty interest at stake, that interest is outweighed by Mr. Ruiz Mata's constitutional rights of confrontation and to due process of law in this capital case.

The Confrontation Clause serves several purposes: “(1) ensuring that witnesses will testify under oath; (2) forcing witnesses to undergo cross-examination; and (3) permitting the jury to observe the demeanor of witnesses.” United States v. Sines, 761 F.2d 1434, 1441 (9th Cir. 1985). It allows the accused to test the recollection and the conscience of a witness through cross-examination and allows the jury to observe the process of cross-examination and make an assessment of the witness’ credibility. Maryland v. Craig, 497 U.S. 836, 851 (1989); Ohio v. Roberts, 448 U.S. 56, 63-64 (1979), (overruled on other grounds). In a case such as the one at bar, where the material witness has received the benefit of the Government refraining from pressing criminal charges in return for his testimony against the accused, it is important that the jury see the reaction and demeanor of the material witness when confronted with questions that will bring out such facts in order for the jury to decide whether to believe his statements and/or how much credit to give to his testimony.

The Ninth Circuit recently explained and embraced the importance of live testimony in United States v. Yida, 498 F.3d 945 (9th Cir. 2007). Yida focused on whether the government had used ‘reasonable means’ to secure the presence of a witness whom the government had allowed the deportation of after the first trial of Mr. Yida. Though Yida is about what constitutes reasonable efforts by the Government, the Ninth Circuit framed the discussion with an exposition on the importance of live testimony.

> Underlying both the constitutional principles and the rules of evidence is a preference for live testimony. Live testimony gives the jury (or other trier of fact) the opportunity to observe the demeanor of the witness while testifying. William Blackstone long ago recognized this virtue of the right to confrontation, stressing that through live testimony, "and this [procedure] only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness." 3 William Blackstone, Commentaries on the Laws of England 373-74 (1768). Transcripts of a witness's prior testimony, even when subject to prior cross-examination,

> do not offer any such advantage, because "all persons must appear alike, when their [testimony] is reduced to writing." Id. at 374. As the National Association of Criminal Defense Lawyers ("NACDL") amicus brief highlights, the superiority of live testimony as contrasted with a transcript of prior testimony has been equally praised in our own judicial system since its inception. See, e.g., Mattox v. United States, 156 U.S. 237, 242-43, 15 S. Ct. 337, 39 L. Ed. 409 (1895) ("The primary object of the constitutional provision in question was to prevent depositions . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."); see also NLRB v. Universal Camera Corp., 190 F.2d 429, 430 (2d Cir. 1951) ("[T]hat part of the evidence which the printed words do not preserve . . . . is the most telling part, for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors. . . ."); Broad. Music, Inc. v. Havana Madrid Rest. Corp., 175 F.2d 77, 80 (2d Cir. 1949) ("The liar's story may seem uncontradicted to one who merely reads it, yet it may be contradicted . . . by his manner . . . which cold print does not preserve.") (internal quotations omitted).

Id. at 950-51.

This is but one passage and there are many others which explain why live testimony is necessary and constitutionally compelled. The constitution only admits prior testimony when absolutely necessary, not just when it is more convenient for the government (or the witness for that matter).

Moreover, the decision to grant video depositions is governed by Federal Rule of Criminal Procedure 15(a) which states that a material witness's deposition may be taken only upon a showing of "exceptional circumstances." United States v. Omene, 143 F.3d 1167, 1170 (9th Cir. 1998). While the material witnesses has argued generally that his continued incarceration would constitute a "hardship" for him, this fact is insufficient to satisfy his burden of proof under Rule 15(a). See Torres-Ruiz v. United States District Court, 120 F.3d 933, 935 (9th Cir. 1997).

First, almost any period of incarceration, by definition, will result in some sort of hardship to that individual. This level of hardship alone cannot constitute extraordinary circumstances. Rather, the Court in Torres-Ruiz made clear that extraordinary circumstances require something more: "tremendous hardship." 120 F.3d at 936. In Torres-Ruiz, the material witnesses were both "the sole support for their respective families in Mexico." Id. at 935 (emphasis added). In the instant case, however, such a tremendous hardship cannot be proven. The material witness apparently claims to be the sole support of his wife and 5 year old child, according to the last line of the motion. The reports provided do not mention any family other than his parents who live in Mexico. Yet he was coming to the United States most likely to earn money. When asked where he was going he indicated that he was going there to look around. He has nine (9) prior immigration apprehensions and at least four aka's including different variations of his name. While the material witness in this case obviously wold prefer to be free of custody, absent more tremendous facts, the hardship he has demonstrated is not sufficient to establish extraordinary circumstances warranting deposition testimony.

Furthermore, this Court should consider the unique circumstances distinguishing the Ninth Circuit's decision in Torres-Ruiz. Unlike this case, the material witnesses' motion for videotape deposition in Torres-Ruiz was unopposed by the defendant. Id. at 934-35. Perhaps more importantly, in Torres-Ruiz the defendant entered a guilty plea less than two weeks after the motion for deposition was made, indicating that the case was already near disposition when the motion was made. Id. at 936-37. The instant case, however, stands in a much different procedural posture.

B. The motion to depose material witnesses is premature because Mr. Ruiz Mata has not been granted sufficient time to formulate a theory of the case.

Mr. Ruiz Mata has pled not guilty to the indictment. Substantive motions of any sort have yet to be filed in this case. The investigation in this case has yet to be completed. In short, it is very early in the case, and to require Mr. Ruiz Mata to cross-examine the material witness at the current juncture of the proceedings and prior to the formulation of his precise theory of the case would severely prejudice his future trial rights.

The motion's prematurity is also evident because the material witness may be necessary for both the pretrial evidentiary hearing and the trial. Although the witness has moved for a deposition to preserve his testimony for trial, he may be a necessary defense witness for pretrial motions. Because the material witness is a percipient witnesses -- and more importantly, a non-governmental witnesses -- to the smuggling endeavor, his testimony may prove to be integral to the fair adjudication of this case. Also, there may be points upon which the material witness's testimony will contradict (or reinforce) a point from another witness's testimony and there is no way for Mr. Ruiz Mata to foresee what that point of evidence or argument will be prior to trial.

C. The motion for deposition should be dismissed because there has been no showing of the unavailability of the witness.

If the Court determines that the detention of the material witnesses must be reviewed at this point in time, the Court can easily resolve the issue by modifying the conditions of release for the material witness so that his continued detention would be unnecessary. Conditions of release for material witnesses are governed by 18 U.S.C. § 3142. Under this section, "[t]he judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured personal appearance bond . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required . . . ." 18 U.S.C. § 3142(b) (emphasis added). Clearly, § 3142(b) suggests that this Court can order that the material witness be released on his own recognizance. Because the material witness has no incentive not to come back to court to testify because he is not being charged with a crime, the material witness has no incentive to flee the country. Indeed, if the statement of facts in support of the complaint in this case is to be believed, this material witness was prepared to pay money to be smuggled illegally into the United States. Therefore, he obviously wants to remain in this country, fully within the subpoena power of the Court.

Moreover, the Bail Reform Act states that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2). This mandate, combined with the preference for release upon one's own recognizance, strongly suggests that the proper remedy for the material witness in this case is a motion to modify the terms of his release, not for the draconian remedy of immediately ordering a videotape deposition and deporting him to the Republic of Mexico, especially not at this very early stage of the proceedings.

III.

CONCLUSION

Because the deposition of this material witness would violate Mr. Ruiz Mata' s Sixth Amendment right to confrontation, would be inappropriately premature and would fail to meet underlying procedural requirements--including the unavailability of witnesses--the motion should be denied. This is not a witness who was innocently trying to get into the United States for the first time, who just made a mistake and wants to go home and never attempt this again. This is an individual coming to the attention of the authorities who has been deported (however informally) 9 previous times. He was traveling in the front seat of the car. In many other cases in this district he would have been charged as a co-defendant. This is not a case where his rights should outweigh Mr. Ruiz Mata's.

In the alternative, it is requested that the deposition may be ordered, but the court reserve ruling on the issue of the deportation until after the testimony is taken.

Respectfully submitted,

Dated: August 20, 2008

/s/Nancy Bryn Rosenfeld
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HON. THOMAS J. WHELAN)

UNITED STATES OF AMERICA, Plaintiff, v. MIGUEL ANGEL RUIZ MATA Defendant.	Case No 08 cr 2558 W (LSP) **CERTIFICATE OF SERVICE**

1. I am a citizen of the United States and a resident of the County of San Diego; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1168 Union Street, Suite 303, San Diego, California 92101.

2. I served the within **POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR DEPOSITION AND RELEASE OF MATERIAL WITNESS** by electronic filing to be transmitted by the Clerk to the United States Attorney's Office in compliance with Electronic Case Service filing procedures.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 20th day of August 2008 at San Diego, California.

S/ Nancy Bryn Rosenfeld